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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/656,146	09/08/2003	Xavier Blin	05725.1239-00	1368
22852	7590	06/02/2010		
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413				
			EXAMINER	
			ROGERS, JAMES WILLIAM	
		ART UNIT	PAPER NUMBER	
		1618		
		MAIL DATE	DELIVERY MODE	
		06/02/2010	PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/656,146

Applicant(s)

BLIN ET AL.

Examiner

JAMES W. ROGERS

Art Unit

1618

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10/05/2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,7-18,20-27,33-44,46-60,66-89,95-106,108-117 and 119-122 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,7-18,20-27,33-44,46-60,66-89,95-106,108-117 and 119-122 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-840)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Applicants amendments to the claims filed 10/05/2009 have been entered. Any rejection from the previous office action filed 04/03/2009 not addressed below has been withdrawn.

Response to Amendment

The declaration under 37 CFR 1.132 filed 10/05/2009 is insufficient to overcome the rejection of claims 1,7-18,20-27,33-44,46-60,66-89,95-106,108-117 and 119-122 based upon 35 U.S.C. 103(a) as being unpatentable over Arnaud et al. (US 5,961,998) as set forth in the last Office action because: An affidavit or declaration under 37 CFR 1.132 must compare the claimed subject matter with the closest prior art to be effective to rebut a prima facie case of obviousness. In the instant case it is not clear how composition 5 and 7 (comparative examples) relates to the prior art cited by the examiner, Arnaud. Furthermore applicants have not explained what prior art comparative example 5 is from since it appears to the examiner that it uses a different ester oil than those taught in Arnaud. The examiner also notes that finding the optimum type of oil in order to achieve the desired hardness levels in a lipstick is hardly unexpected since a harder lipstick would be a desirable property for such a cosmetic and this property would be adjusted by known selection processes for the various constituent ingredients of the lipstick. Lastly the examiner notes that objective evidence of nonobviousness must be commensurate in scope with the claims which the evidence is offered to support. The examples within applicants declaration are all drawn to a lipstick composition when clearly the claimed invention reads upon any type of cosmetic

composition including mascara, facial mask, eye liner ect, for some of these cosmetic compositions a hard formulation may not be desirable. Furthermore the constituent ingredients within the lipstick composition are much narrower in scope than what is claimed, for instance the lipsticks all contain low viscosity phenyl siloxane oil when independent claim 1 does not require such an oil. Additional ingredients within the lipstick composition that is not required in the claimed composition include microcrystalline cellulose, alkyl dimethicone and mixtures of triglycerides.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1,7-18,20-27,33-44,46-60,66-89,95-106,108-117 and 119-122 are rejected under 35 U.S.C. 103(a) as being unpatentable over Arnaud et al. (US 5,961,998), for the reasons set forth in the previous office action filed 04/29/2008.

Claims 1,7-18,20-27,33-44,46-60,66-89,95-106,108-117 and 119-122 are rejected under 35 U.S.C. 103(a) as being unpatentable over Arnaud et al. (US 5,961,998) in view of Willemin et al. (US 6,592,855 B1, cited in previous office action), for the reasons set forth in the previous office action filed 04/29/2008.

Response to Arguments

Applicant's arguments filed 10/05/2009 have been fully considered but they are not persuasive. Applicants assert the declaration shows that assuming compositions with similar ingredients will exhibit the same properties is incorrect.

The relevance of this assertion is unclear. As noted above the declaration does not compare applicants claimed invention with Arnaud. Arnaud as noted in previous office actions claims the same ester oil as claimed by applicant, tridecyl trimellitate. Thus if applicants wish to show some type of unexpected results they should compare their claimed amounts of ester oil to amounts outside of their claimed range. The only reason Arnaud is not a 102 type of rejection is because of applicants claimed amounts of the high viscosity phenylsiloxane oil and non-volatile ester oil, Arnaud discloses an overlapping amount range but not a range within the claimed amounts.

Applicants further assert that Kerkhoven is not applicable to the combination of Arnaud and Willemin because Kerkhoven was drawn to mixing known detergents to make a third detergent and differs from their claimed elements which are combined to make a lipstick.

The relevance of this assertion is unclear. It is noted by the examiner that applicants claim a cosmetic formulation not just a lipstick, a cosmetic formulation is much broader in scope than just a lipstick composition. In the final rejection filed 04/29/2008 the examiner does not cite Kerkhoven in the rejection over the combination of Arnaud and Willemin. Regardless as noted in the action filed 04/29/2008 applicants claims are no more than the combination of conventional ingredients found in cosmetic formulations and to combine those known ingredients would have been obvious. The reasoning provided by Kerkhoven is not just applicable to detergent formulations but any formulation where known ingredients from one particular field of endeavor, in this instance cosmetics, are combined to make another formulation, the combination flows

from their having been used individually in the prior art for the same purpose. In the present case applicants are combining known oils each of which was well known in the prior art to be useful in the cosmetic industry, thus to combine them to make another composition would have been obvious.

Conclusion

No claims are allowed at this time.

Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to James W. Rogers, Ph.D. whose telephone number is (571) 272-7838. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Hartley can be reached on (571) 271-0616. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Michael G. Hartley/

Supervisory Patent Examiner, Art Unit 1618